

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Briefs December 20, 2005

**STATE OF TENNESSEE v. DAVID LEE KESTNER**

**Direct Appeal from the Criminal Court for Davidson County  
No. 2003-D-2670 Steve Dozier, Judge**

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**No. M2004-02478-CCA-R3-CD - Filed February 10, 2006**

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The defendant, David Lee Kestner, pled guilty to felony murder, aggravated burglary, and especially aggravated robbery, in exchange for concurrent sentences of life, three years, and fifteen years, respectively. As a condition of his guilty plea, the defendant reserved three certified questions of law concerning the denial of his motions to suppress and dismiss. Upon our review of the record and the parties' briefs, we conclude the questions regarding the denial of the defendant's motion to suppress are not dispositive of the case, and therefore cannot be reviewed by this court. We further conclude that the trial court did not err in denying the defendant's motion to dismiss the indictment. Accordingly, we affirm the judgments of the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed**

J.C. McLIN, J., delivered the opinion of the court, in which DAVID H. WELLES and JOHN EVERETT WILLIAMS, JJ., joined.

Patrick G. Frogge (on appeal), Nashville, Tennessee, and Kerry Haymaker (at trial), Nashville, Tennessee, for the appellant, David Lee Kestner.

Paul G. Summers, Attorney General and Reporter; David E. Coenen, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Amy Eisenbeck, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

**BACKGROUND**

The following is a chronological summary of the history of this case. On October 31, 2003, the defendant was indicted by the Davidson County Grand Jury for premeditated first-degree murder, first-degree felony murder, especially aggravated robbery, and two counts of aggravated burglary. On August 3, 2004, the defendant filed a motion to dismiss the indictment on grounds it violated Rule 8(a) of the Tennessee Rules of Criminal Procedure. On August 9, 2004, the defendant filed a

motion to suppress his statement to the police on grounds the statement was given in violation of his right to counsel and his rights under the Fifth Amendment. The trial court conducted a hearing on August 12, 2004, and issued a lengthy order the following day, denying both motions. It is from this hearing that we glean the following details of the indicted offenses.

On the morning of April 28, 2003, several officers were involved in a high-speed vehicle pursuit of the defendant. Officer Johnson testified that a car matching the description of a car involved in a series of burglaries was reported to the police. According to Officer Johnson, he and other police officers were instructed to stop the car and question the driver. Officer Johnson testified that when the pursuit began, he was not aware the defendant was a suspect in a homicide investigation. Officer Helm, another officer involved in the pursuit, testified that the defendant stopped his car, exited his vehicle, shot at several officers, and fled on foot. The officers and a K-9 unit tracked the defendant to a hiding place underneath a nearby house. The officers apprehended the defendant, searched under the house, and recovered a .25 caliber pistol. Officer Helm stated that the police pursuit of the defendant had nothing to do with the ongoing homicide investigation, but involved the police officers' attempt to question the defendant about the burglaries.

From these events, the defendant ultimately pled guilty to felony vandalism, aggravated assault, felony evading arrest, misdemeanor evading arrest, and two counts of felony reckless endangerment on November 10, 2003.<sup>1</sup>

On August 16, 2004, the defendant pled guilty to felony murder, aggravated burglary, and especially aggravated robbery. The facts giving rise to these charges were presented by the state at the plea hearing as follows:

[O]n April twenty-third, two-thousand-three, the Defendant's friend, the Co-defendant in this case, Jimmy Bonds, had gone over to the home of Thomas West and burglarized the home, when he wasn't there. During that burglary Mr. Bonds stole a large amount of marijuana.

On the twenty-sixth, Mr. Bonds got his friend, the Defendant, Mr. Kestner, to go back over to the residence to steal more drugs, money, and whatever else they could find in the apartment.

They went - - before - - before going over to Mr. West's apartment, which was located on the third floor of an apartment complex in Spinnaker Cove Apartments in Davidson County, they went to the apartment complex across the street, The Arbors, and stole a twenty-four-foot extension ladder off of a van in that complex; brought it over to Mr. West's complex, set it up against the back side of Mr. West's apartment, the balcony; and climbed up onto the balcony.

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<sup>1</sup> The judgment sheets reflecting the defendant's guilty pleas for felony vandalism, aggravated assault, felony evading arrest, misdemeanor evading arrest, and two counts of felony reckless endangerment were not included in the record. However, this information was included in the trial court's order denying the defendant's motions to dismiss and suppress.

The Defendant entered the residence first, while carrying a twenty-five-caliber weapon, handgun; broke through the screen door - - the glass door to the balcony was already open - - entered the apartment, while Mr. West was sitting on his couch with his dogs watching TV.

Pretty much right when they walked into the apartment, the Defendant Kestner fired the weapon at Mr. West and hit him in his chest.

At that point Mr. West stood up, took a few steps toward the Defendant; and the Defendant then shot him in the head, which killed him immediately.

At that point the Defendant and Mr. Bonds went through the apartment, stole numerous items from the apartment, including the victim's gun, his jewelry, some drugs, money, personal items that were located in several bags throughout the apartment, including the victim's birth certificate, which was later found in a search warrant at the Defendant's friend Mr. Bond's parent's home.

As a condition of his guilty plea, the defendant waived his right to appellate review with the exception of three certified questions. The trial court accepted the defendant's plea and signed judgment sheets containing the notation, "Issues in motion to suppress and motion to dismiss the indictment are reserved as certified questions of law."

On August 25, 2004, the defendant filed a motion to withdraw his guilty plea. In support of his motion, the defendant alleged that since the time he pled guilty, his counsel had informed him that the two certified questions regarding the motion to suppress were not dispositive of the case and would not be reviewed by this court. On September 10, 2004, the trial court conducted a hearing on the defendant's motion to withdraw his guilty plea and took the matter under advisement.

Meanwhile, on September 15, 2004, the trial court and the parties signed an addendum order to the final judgment regarding the certified questions of law.<sup>2</sup> In the addendum order, the trial court followed the procedure set out in Rule 37(b)(2) of the Tennessee Rules of Criminal Procedure, and *State v. Preston*, 759 S.W.2d 647 (Tenn. 1988), for reserving certified questions of law. Also, on September 15, 2004, the defendant filed his notice of appeal of "the Certified Questions of Law designated in the Addendum to the Judgment entered the 15<sup>th</sup> day of September, 2004."

Afterward, on September 28, 2004, the trial court issued an order denying the defendant's motion to withdraw his guilty plea, finding that the defendant entered his plea knowingly, voluntarily, and understandingly. The transcript of the guilty plea colloquy showed that at the time

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<sup>2</sup> We note that the state argues in its brief that the defendant did not properly reserve the certified questions because the trial court did not have jurisdiction when it issued the addendum order to comport with Tennessee Rule of Criminal Procedure 37(b)(2). According to the state, because the addendum was not filed until September 28, 2004, the trial court would have lost jurisdiction due to the defendant's filing a notice of appeal. However, it is our view that the addendum order in fact preceded the notice of appeal. First, the addendum was signed on September 15, 2004, and second, the defendant referenced the addendum in his notice of appeal. It is our view that the defendant should not be punished for any delay by the court clerk in *stamping* the addendum, when it appears the trial court did have jurisdiction to issue the order and did so in the proper time frame.

of the plea the defendant was aware that the appellate court might not accept the certified questions he hoped to appeal.

## ANALYSIS

The three certified questions presented for our review are whether the trial court erred by: (1) denying the defendant's motion to suppress his statement given in violation of his rights under the Fifth Amendment as set out in *Miranda v. Arizona*, 384 U.S. 436 (1966) and *Missouri v. Seibert*, 542 U.S. 600 (2004); (2) denying the defendant's motion to suppress his statement given after he unequivocally invoked his right to counsel; and (3) denying the defendant's motion to dismiss the indictment as violative of Rule 8(a) of the Tennessee Rules of Criminal Procedure.

In order for this court to have jurisdiction to consider a certified question reserved in a plea agreement, the following prerequisites must be met:

(A) the judgment of conviction, or other document to which such judgment refers that is filed before the notice of appeal, must contain a statement of the certified question of law reserved by defendant for appellate review; (B) the question of law must be stated in the judgment or document so as to identify clearly the scope and limits of the legal issue reserved; (C) the judgment or document must reflect that the certified question was expressly reserved with the consent of the state and the trial judge; and (D) the judgment or document must reflect that the defendant, the state, and the trial judge are of the opinion that the certified question is dispositive of the case.

Tenn. R. Crim. P. 37(b)(2)(I). However, Rule 37(b)(2) goes on to clarify that "the judgment or document need not reflect the states's consent to the appeal or the state's opinion that the question is dispositive." *Id.* 37(b)(2)(iv). Furthermore, even if the trial court and the parties agree that a question is dispositive of the issue, this court must still make an independent investigation into the dispositive nature of the certified question before accepting appellate review. *Preston*, 759 S.W.2d at 651 (opinion on petition to rehear). A certified question issue is dispositive only "when the appellate court 'must either affirm the judgment or reverse and dismiss.'" *State v. Walton*, 41 S.W.3d 75, 96 (Tenn. 2001) (quoting *State v. Wilkes*, 684 S.W.2d 663, 667 (Tenn. Crim. App. 1984)).

## Motion to Suppress

We begin our review by noting that two of the defendant's certified questions presented for our review specifically challenge the constitutionality of his confession. However, it is our view that these two questions are not dispositive of the case because the resolution of these questions would not require the dismissal of the defendant's convictions at issue. Even without the confession, the record reflects that the state had ample other evidence of the defendant's guilt. For instance, the defendant was arrested wearing "[a] thick gold chain stolen from the victim after he was murdered." The vehicle the defendant was apprehended in matched the detailed description of the vehicle

witnesses saw somebody leaving the victim's apartment get into. Additionally, police officers found a .25 caliber handgun under the house where the defendant hid on April 28, 2003, and ballistics experts determined that a .25 caliber gun was used to kill the victim. As such, there is sufficient evidence of the defendant's guilt independent of his confession. *See, e.g., State v. Terry A. Hawkins*, No. M2002-01819-CCA-R3-CD, 2004 WL 735028, at \*3 (Tenn. Crim. App., at Nashville, Apr. 6, 2004), *perm. app. denied* (Tenn. Nov. 15, 2004); *State v. Bobby Ray McCutcheon*, No. 87-89-III, 1988 WL 10066, at \*1 (Tenn. Crim. App., at Nashville, Feb. 9, 1988). Even if we determined that the defendant's confession should have been suppressed, our determination would not dispose of the independent proof of murder brought against the defendant. Accordingly, we conclude the questions regarding the trial court's denial of the defendant's motion to suppress are not dispositive of the case; and therefore, not properly before us.

### **Motion to Dismiss**

The defendant's final question challenges the validity of the indictment. The defendant argues that the indictment in this case should have been dismissed because the charged offenses occurred during the same criminal episode as the offenses he pled guilty to in the other indictment and were therefore subject to mandatory joinder under Tennessee Rule of Criminal Procedure 8(a). Initially, we note that this question is dispositive of the action because we would have to dismiss the defendant's convictions at issue if these offenses were based on the same conduct or occurred during the same criminal episode as the offenses in the other indictment. *See* Tenn. R. Crim. P. 8(a). Tennessee Rule of Criminal Procedure 8(a) states:

(a) Mandatory Joinder of Offenses. —Two or more offenses shall be joined in the same indictment, presentment, or information, with each offense stated in a separate count, or consolidated pursuant to Rule 13 if the offenses are based upon the same conduct or arise from the same criminal episode and if such offenses are known to the appropriate prosecuting official at the time of the return of the indictment(s), presentment(s), or information(s) and if they are within the jurisdiction of a single court. A defendant shall not be subject to separate trials for multiple offenses falling within this subsection unless they are severed pursuant to Rule 14.

The Advisory Commission Comments elaborate on the purpose of Rule 8(a):

This rule is designed to encourage the disposition in a single trial of multiple offenses arising from the same conduct and from the same criminal episode, and should therefore promote efficiency and economy. . . .

The Commission wishes to make clear that section (a) is meant to stop the practice by some prosecuting attorneys of "saving back" one or more charges arising from the same conduct or from the same criminal episode. Such other charges are barred from future prosecution if known to the appropriate prosecuting official at the time that the other prosecution is commenced, but deliberately not presented to a grand jury. "Appropriate prosecuting official" shall be so construed as to achieve the

purpose of this rule, which is the prevention of a deliberate and willful “saving back” of known charges for future prosecution. The refusal of the grand jury to act upon such other charges would not be a violation of this joinder rule so as to bar future prosecution of such charges.

Insight into what constitutes a “criminal episode” is found in *Tennessee Practice* by David Raybin.

“[C]riminal episode”—relates to several distinct offense which arise out of separate actions or conduct but which occur in a closely connected series of events in place and time. Such a concept is difficult of definition and is made more apparent by example. Thus, where a defendant successively discharges a weapon and hits different people with different bullets, the activity is a “continuous transaction.” Where a defendant robs a victim, steps back and then shoots the victim, this activity is in the course of a “single criminal episode or transaction.”

David Louis Raybin, *Criminal Practice and Procedure* § 17.23 (1984).

The Commentary to § 13-1.2 of the American Bar Association Standards for Criminal Justice also gives guidance as to what constitutes a criminal episode.

‘Single criminal episode’ offenses normally are generated by separate physical actions. The actions may be committed by separate defendants. In other respects, however, they are similar to same conduct offenses: they occur simultaneously or in close sequence, and they occur in the same place or in closely situated places. A critical characteristic of single episode offenses, particularly in cases involving otherwise unrelated offenses or offenders, is the fact that proof of one offense necessarily involves proof of the others.

ABA Standards for Criminal Justice § 13-1.2 Commentary (1986) (Footnotes Omitted).

Our review begins with the principle that the findings of fact made by the trial court at a motion to dismiss are binding upon this court unless the evidence contained in the record preponderates against them. *State v. England*, 19 S.W.3d 762, 766 (Tenn. 2000). The trial court, as the trier of fact, is able to assess the credibility of the witnesses, determine the weight and value to be afforded the evidence, and resolve any conflicts in the evidence. *State v. Odom*, 928 S.W.2d 18, 23 (Tenn. 1996). This court, however, is not bound by the trial court’s conclusions of law. *State v. Simpson*, 968 S.W.2d 776, 779 (Tenn. 1998). The application of the law to the facts found by the trial court are questions of law that this court reviews de novo. *State v. Daniel*, 12 S.W.3d 420, 423 (Tenn. 2000).

In ruling on the motion to dismiss the indictment, the trial court stated:

The proof at the motion showed that on the morning of April 28, 2003[,] Metropolitan Police Officers Johnson and Helms attempted to stop the defendant's car which matched a description of [a car used in] a string of burglaries in the Joelton area of Davidson County. Immediately after attempting to pull the vehicle over a police chase ensued which ultimately ended at the defendant's residence. When arriving at the house the defendant jumped out and shot a .25 caliber pistol at Hill. The officers at the scene gave chase and after a brief pursuit caught [the defendant] on the property premises. A subsequent search incident to arrest found the gun in question lodged behind a piece of wood. These events occurred some 36 hours after the murder of [the victim] and some 10-15 miles from the murder scene.

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A review of the proof leads the Court to conclude the events surrounding the murder of [the victim] and the police chase 36 hours after the fact are not part of a "criminal episode" and as such are not subject to mandatory joinder pursuant to the Tennessee Rules of Criminal Procedure. Officer Johnson testified he attempted to stop the Oldsmobile driven by [the defendant] to question him about a string of burglaries in Joelton. It was not until the defendant was apprehended and the .25 caliber seized that the officers discovered he was wanted for questioning in the murder of [the victim]. The State is correct in asserting the fleeing and subsequent firing of shots at the police represents a separate sequence not defined as a "criminal episode". [sic] The distinctive acts of the defendant are not a part of a larger or more comprehensive series. It does not matter for purposes of the joinder issue that the .25 caliber gun may be introduced at the murder trial as a weapon of similar caliber to the murder weapon. The Court accredits the testimony of Officers Johnson and Helm and holds the defendant's motion to dismiss the indictment is devoid of merit.

It is our view that the trial court was correct in finding that the two indictments against the defendant represented two distinct criminal episodes. First, the events underlying the two indictments were not temporally related. The record reflects that the offenses occurred over 30 hours apart. The murder, robbery, and burglary occurred the night of April 26, 2003, while the evading arrest, aggravated assault, vandalism, and reckless endangerment occurred the morning of April 28, 2003. The second series of offenses did not occur as the defendant was actively leaving or fleeing from the scene of the first events, but instead as he was out driving around in a different neighborhood.

Second, the events were not spatially related. The April 26th events happened at the Spinnaker Cove Apartments in Hermitage, while the April 28th events happened in the Joelton area of Davidson County. Without belaboring exact distances, our review indicates that the events occurred in distinctly different areas of Nashville approximately 10 to 15 miles apart.

Third, the pursuit of the defendant, which gave rise to the other indictment, was to question the defendant about his potential involvement in a string of burglaries, not for the murder. Accrediting the officers' testimony, as the trial court did, the defendant's vehicle was reported as being at the scene of several burglaries in the Joelton area. The officers initiated a pursuit of the defendant for the purpose of questioning him about those burglaries. It was only later that the defendant was questioned about the murder of the victim.

Furthermore, the defendant's argument that "proof of one offense necessarily involves proof of the other," does not sway our opinion. One can prove the defendant fled from and shot at police officers without proving the defendant broke into the victim's house and murdered him, and vice versa. Even though a handgun, found at the scene of the second episode, might have been introduced if there had been a trial does not change our view. First, it is speculation that the gun would have been introduced. Second, officers found a second .25 caliber handgun while executing a search warrant in conjunction with this case. Third, there is independent evidence of the defendant's culpability for both criminal episodes.

From our review of the record, it appears that the offenses underlying both indictments were independently motivated and did not occur in a closely connected series of events in place and time. Additionally, we note that the policy behind Tennessee Rule of Criminal Procedure 8(a) is to prevent multiple trials, and here, the defendant did not choose to go to trial on either indictment; therefore this policy has not been compromised in any way. We conclude the two indictments represent two distinct criminal episodes, and thus were not subject to mandatory joinder under Rule 8(a) of the Tennessee Rules of Criminal Procedure.

### **CONCLUSION**

Following our review of the record, the parties' briefs, and the applicable law, we affirm the judgments of the trial court.

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J.C. McLIN, JUDGE